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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20544

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding)

PP Docket No. 93-253

To: Commercial Wireless Division
Wireless Telecommunications Bureau
Room 5202
STP 1700A1

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**OPPOSITION TO TELEPHONE ELECTRONICS CORPORATION'S
EMERGENCY PETITION FOR WAIVER**

BET Holdings, Inc. ("BHI"), by its attorneys, hereby submits its Opposition to Telephone Electronics Corporation's ("TEC") Emergency Petition for Waiver, filed with the Federal Communications Commission (the "Commission") on March 28, 1995.^{1/} BHI submits that grant of the waiver, pursuant to Sections 1.3 and 24.819(a) of the Commission's Rules, 47 C.F.R. §§ 1.3, 24.819(a), is premature, unwarranted and will inhibit the Commission's ability to regulate prospectively through rulemaking.

I. **INTRODUCTION**

On January 6, 1995, TEC petitioned the United States Circuit Court of Appeals for the District of Columbia Circuit (the "Court") to review two Commission Orders

^{1/} See Emergency Petition For Waiver, PP Docket No. 93-153 (filed March 28, 1995) (hereafter "Petition").

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establishing the auction design and bidding procedures for the assignment of broadband Personal Communications Services ("PCS") licenses.^{2/} TEC contended that the broadband PCS designated entity rules are unlawful, arbitrary and capricious, not supported by substantial evidence and otherwise not in accordance with law.

TEC followed the filing of its Petition with an Emergency Motion for Stay asking the Court to delay the C Block auctions until action is taken on the merits of its Petition.^{3/} In support of its request, TEC argued that the Commission's Rules unlawfully discriminate among bidders on the basis of race and gender on a record that does not demonstrate a pattern or practice of discrimination against minorities and women in the wireless telephone industry. TEC's motion challenged the preferences afforded to minorities and women as violative of the Equal Protection Clause of the U.S. Constitution.

The Court granted the Emergency Motion for Stay on March 15, 1995, two days after the auctions for the A & B Block PCS licenses closed.^{4/} Still pending before the Court, however, is an Emergency Motion to Vacate Stay for Want of Article III Standing filed by Cook Inlet Region, Inc. ("Cook Inlet") on March 23, 1995 arguing that TEC lacks

2/ See Petition to Review, Case No. 95-1015 (D.C. Cir. filed January 6, 1995).

3/ See Emergency Motion for Stay, Case No. 95-1015 (D.C. Cir. filed by TEC on February 10, 1995).

4/ See Order, Telephone Electronics Corporation v. FCC, Case No. 95-1015 (D.C. Cir. March 15, 1995).

standing to bring its Constitutional claims.^{5/} The Commission filed in support of Cook Inlet's Motion on March 30, 1995.^{6/}

On March 28, 1995, TEC filed an Emergency Petition For Waiver with the Commission requesting waiver of Section 24.709(a)(1) of the Commission's Rules to permit TEC to participate in the C Block auctions.^{7/} If granted, TEC commits to dismiss its case before the Court, thereby permitting the C Block auctions to go forward.

II. **COMMISSION ACTION ON THE WAIVER REQUEST SHOULD BE DEFERRED UNTIL A RULING IS MADE ON COOK INLET'S EMERGENCY MOTION TO VACATE THE STAY.**

BHI opposes consideration of TEC'S waiver request as premature until the Court has ruled on Cook Inlet's Emergency Motion to Vacate the Stay. As argued by Cook Inlet, BHI believes that TEC lacks standing to bring the Constitutional claims that have resulted in the postponement of the C Block auctions. Accordingly, the Commission should not exempt TEC from the operation of its affiliation rules until the Court has confirmed that TEC's challenges are properly before the Court, and that the appropriate showing has been made to warrant the extreme remedy of a stay. Granting the substantial waiver requested by TEC, without judicial confirmation of its standing, will disserve the public interest and invite greater uncertainty in the PCS competitive bidding process.

5/ See Emergency Motion of Intervenor Cook Inlet Region, Inc. ("CIRI) To Vacate Stay for Want of Article III Standing, Case No. 95-1015 (D.C. Cir. filed March 23, 1995).

6/ See Response of Federal Communications Commission to Emergency Motion of Intervenor Cook Inlet Region, Inc. to Vacate Stay for Lack of Article III Standing, No. 95-1015 (D.C. Cir. filed March 30, 1995).

7/ See Emergency Petition for Waiver, PP Docket No. 93-253 (filed by TEC on March 28, 1995).

As explained in Cook Inlet's filing, the operation of the Commission's affiliation rules and the rules governing the participation of minorities and women in the competitive bidding process are not the source of TEC's alleged injury. Even if TEC were a minority or women-owned entity, as defined under the Commission's Rules, it would remain unable to participate in the C Block auctions. Accordingly, the Court's prior analysis of TEC's likelihood of success on the merits of its case, a significant factor in determining whether a stay is warranted, is flawed.^{8/}

The Commission must give the Court an opportunity to revisit its prior determination before taking the drastic step of permitting a disgruntled, non-qualifying entity to participate in the entrepreneur block auctions. The unprecedented "exception" requested by TEC threatens the integrity of the auction process and should not be granted until TEC's standing to challenge the constitutionality of the Rules is confirmed. Granting the waiver before the Court acts would be both imprudent and irresponsible.

III. GRANT OF TEC'S WAIVER REQUEST WILL ENCOURAGE DISSATISFIED PARTIES TO FILE SIMILAR WAIVERS, CREATING DIFFICULT PRECEDENT FOR THE COMMISSION TO APPLY.

If the Commission chooses to address immediately the merits of TEC's waiver request, BHI urges the Commission to deny the request as unwarranted and contrary to the public interest. Permitting TEC to participate in the C Block auctions simply because it has challenged the Commission's rules in court will only encourage other non-qualifying entities,

^{8/} See Emergency Motion of Intervenor Cook Inlet Region, Inc. ("CIRI") to Vacate Stay for Want of Article III Standing, Case No. 95-1015 at 6-19 (D.C. Cir. filed March 23, 1995).

who were unsuccessful in convincing the Commission to adopt specific rules during the informal rulemaking process, to ask for similar relief. The Commission will be called upon to justify the grant of the TEC waiver in the context of identical waiver requests seeking similar exemptions from the Commission's entrepreneur block financial caps. The Commission will be unable to control a waiver process that could destroy the integrity of the entrepreneur blocks.

In requesting the waiver of the Commission's affiliation rules, TEC undermines the Commission's ability to regulate in the public interest. After over two years of extensive Commission proceedings analyzing the proper competitive bidding structure for the assignment of broadband PCS licenses, TEC now seeks, at the eleventh hour, to compel the Commission to create a "limited" exception to its Rules. If denied, TEC will continue its efforts to stall the delivery of innovative PCS services to the public. The Commission should not submit to threats, particularly after the Commission has explicitly determined that the public interest requires that companies, such as TEC, not be permitted to participate in the C Block auctions.^{9/}

TEC vigorously complains that gross revenue caps should not dictate its eligibility to bid in the entrepreneur blocks.^{10/} The Commission, in explicitly rejecting this

9/ See Fifth Memorandum Opinion and Order, Competitive Bidding, PP Docket No. 93-253 at ¶ 45 (adopted November 10, 1994, released November 23, 1994) ("Finally, we decline to create an exception to our affiliation rules for rural telephone companies. We are concerned that relaxing our rules would unfairly match large rural telephone companies, with greater access to capital, against entrepreneurs and designated entities (including small and medium-sized rural telephone companies) (emphasis added)).

10/ See Emergency Request for Waiver at 6.

position, noted that its concern was to make the C Block licenses available to entities with limited access to capital.^{11/} The fact that TEC's resale affiliates must pay access fees that reduce their profitability does not alter the fact that the size of TEC's businesses makes it a formidable competitor to other designated entities participating in the C Block auctions, including other rural telephone companies.^{12/} Furthermore, TEC's ability to collect revenues from its customers to cover TEC's access and other costs suggests that its resale business serves a market niche relatively immune from competitive pressures. Simply put, TEC is too big to deserve the benefits that C Block participation affords.^{13/}

Entertaining such requests will only undermine the Commission's ability establish and implement rules through the rulemaking process. A message will be sent that parties participating in Commission rulemakings will be able to force the Commission's hand even in the wake of a balanced, exhaustive rulemaking proceeding. Frankly, what TEC seeks to accomplish in this instance is to compel the Commission to give it exactly what in

11/ See supra n. 8; see also Fifth Memorandum Opinion and Order at ¶ 23 ("We will retain a single gross revenues standard, which is an established method for determining size eligibility for various kinds of federal programs that aid smaller businesses.")

12/ TEC has lobbied throughout the PCS rulemaking proceedings to achieve exactly what it seeks in filing its Waiver Request. See Comments of TEC, Competitive Bidding, PP Docket No. 93-253 at 17 (filed November 10, 1993); Reply Comments of TEC, Competitive Bidding, PP Docket No. 93-253 at 10 (filed November 30, 1993); TEC's Petition for Reconsideration, Competitive Bidding, PP Docket No. 93-253 at 14 (filed August 22, 1994). Having been unsuccessful in convincing the Commission that the public interest would be served by exempting rural telephone companies from the Commission's affiliation Rules, TEC has decided to force the issue and seek a private settlement.

13/ Further, in addition to bidding in the entrepreneur block, TEC has the audacity to request a 10% bidding credit -- this, after the Commission has explicitly determined that rural telephone companies have greater access to capital than other designated entities. See Fifth Memorandum Opinion and Order ¶¶ 45, 111.

wants in exchange for the withdrawal of its suit. This administrative "blackmail" cannot be entertained -- much less indulged.^{14/}

IV. THE COMMISSION SHOULD NOT GRANT WAIVERS TO EXPEDITE THE C BLOCK AUCTIONS.

If the Commission is determined to move the C Block auctions forward prior to the Court's consideration of TEC's standing, the Commission should not proceed by granting waivers of its Rules. Rather, the Commission should initiate an accelerated rulemaking to eliminate or equalize the bidding credits afforded to minority and women-owned entities and small businesses in the entrepreneurs' blocks. Alternatively, the Commission should adopt a "sliding scale" approach under which distinct benefits are afforded C Block bidders based on the amount of revenues they earn. Conditioning bidding credits and other benefits on factors exclusive of race or gender will insulate the entrepreneur block bidding structure from future Constitutional challenge.

Finally, BHI urges the Commission to modify its rules prior to the commencement of the C Block auctions. Addressing these issues after the auctions close, and PCS long-form applications are filed, will only complicate the licensing process and result in greater legal and procedural difficulties. Potential bidders should not be encouraged

^{14/} If TEC is permitted to participate in the C Block auctions, designated entities will be disadvantaged as they compete with companies that can access capital unavailable to others vying for the same licenses. Subsequent waiver requests by other parties will only serve to undermine Commission efforts to achieve Congress' mandate to encourage the participation of small businesses, minority and women-owned entities and rural telephone companies in the bidding process. See Communications Act of 1934 § 309(j)(4)(D) and 309(j)(3)(B), 47 U.S.C. § 309(j)(4)(D), 309(j)(3)(B) (as amended by the Omnibus Budget Reconciliation Act of 1993).

to raise Constitutional concerns during the Petition to Deny stage of the PCS competitive bidding process.^{15/} Postponing consideration of these issues until the auctions are complete only invites further delay. If the Commission wishes to act before Cook Inlet's Motion is considered, it should address these issues in an accelerated rulemaking, before the Commission undertakes the costly and time consuming process of conducting the C Block auctions.

V. CONCLUSION

BHI urges the Commission to defer consideration of TEC's waiver request until the Court rules on Cook Inlet's Emergency Motion to Vacate the Stay. BHI believes that TEC lacks standing to bring its Constitutional claims and that the Court will vacate the stay upon its reevaluation of TEC's likelihood of success on the merits of its appeal. Granting the waiver at this time will unnecessarily complicate the auction process, which can expeditiously move forward when the Stay is lifted.

Should the Commission address the merits of TEC's waiver request, BHI urges the Commission to deny the request as contrary to the public interest. Permitting TEC to participate will encourage other dissatisfied parties to file similar waivers, creating difficult precedent for the Commission to apply. Moreover, grant of the request will

^{15/} See Response of Federal Communications Commission to Emergency Motion of Intervenor Cook Inlet, Case No. 95-1015 at 3 (filed March 30, 1995) ("Moreover, following the C Block auction, any bidder in the auction that is harmed by application of the bidding credit or installment payment rules may allege that those rules and the statute are unconstitutional. Any equal protection challenge is properly brought by a party affected by those rules rather than TEC").

undermine the Commission's ability to adopt rules in the context of a rulemaking proceeding and will undermine the integrity of the C Block auctions.

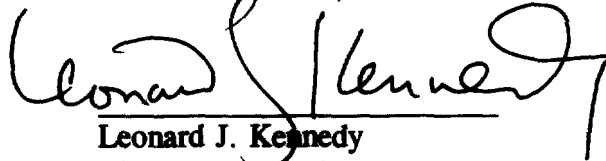
Permitting TEC to participate in the C Block auctions will also directly contravene Congress' mandate to encourage the participation of designated entities in the PCS auctions. Allowing non-qualifying entities into the block will deny licenses to designated entities with limited access to capital. The intended beneficiaries of the entrepreneur block bidding structure, therefore, will be unable to participate successfully in the PCS auctions.

Finally, the Commission should not seek to expedite the C Block auctions by granting waivers of its Rules to specific parties. Rather, the Commission should initiate an accelerated rulemaking, prior to the commencement of the C Block auctions, to eliminate or equalize the entrepreneur block bidding credits, or provide preferences to designated entities participating in the C Block auctions according to a sliding scale, based on the level of their

revenues. Waiting to address these issues until the auctions are complete will only lead to greater delay and uncertainty in the competitive bidding process.

Respectfully submitted,

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April 3, 1995

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 3rd day of April, 1995, I caused to be delivered the foregoing Opposition to Telephone Electronics Corporation's Emergency Petition for Waiver by first class mail, postage prepaid to:

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Vicki Lynne Lyttle